Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, 1975

No. 75-207

APPALACHIAN POWER COMPANY,
Appellant,

v.

THE PUBLIC SERVICE COMMISSION OF WEST VIRGINIA,
Appellee.

ON APPEAL FROM THE SUPREME COURT
OF APPEALS OF THE STATE OF WEST VIRGINIA

JURISDICTIONAL STATEMENT

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August 8, 1975

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JURISDICTIONAL STATEMENT

Appalachian Power Company ("Appellant", "Appalachian" or the "Company") appeals from an order of the Supreme Court of Appeals of West Virginia, entered on May 12, 1975, upholding an order of the Public Service Commission of West Virginia (the "Commission") and submits this Statement to demonstrate that the Supreme Court of the United States has jurisdiction of the appeal and that a substantial question is presented.

In the event that the order of the Supreme Court of Appeals is not construed as a judgment by the highest court of the state in which a decision could be had within the meaning of 28 U.S.C. 1257(2), Appalachian respectfully requests that the Court treat this as an appeal directly from the Commission (see p. 4, *infra*). The reason for this

alternative approach is apparent upon a reading of the Supreme Court of Appeals' order of May 12, 1975 (App., p. 1a). That order does not make it clear whether the court rejected the Company's petition for review and affirmed the Commission's order on the merits or whether the court merely declined to exercise its appellate jurisdiction.

Opinion Below

The order of the Supreme Court of Appeals of West Virginia entered May 12, 1975 is not reported and that court issued no opinion. The order of the Supreme Court of Appeals of West Virginia entered June 9, 1975 denying Appalachian's supplemental petition is not reported and that court issued no opinion. The Orders of the Commission dated March 6, 1975 and March 26, 1975 are not reported. Copies of each order are included in the Appendix at pp. 1a, 3a, 4a and 7a, respectively.

Jurisdiction

This suit was taken directly from the Commission to the Supreme Court of Appeals of West Virginia (the highest court in the state) pursuant to the provisions of the West Virginia Code, Chapter 24, Article 5, Section 1,* to review orders of the Commission requiring Appalachian to cease and desist from certain service practices and to refund charges paid by customers for "such unapproved practices." Although the Commission did not cite specific statu-

* This Section provides the only means for judicial review in the West Virginia courts of an order of the Commission and states in relevant part:

> "Any party feeling aggrieved by the entry of a final order by the commission, affecting him or it, may present a petition in writing to the Supreme Court of Appeals . . . within thirty days after the entry of such order, praying for the suspension of such final order . . . The court or judge shall fix a time for the hearing on the application . . . after arguments by counsel the court shall decide the matter in controversy as may seem to be just and right."

tory authority for its order, the Commission did, in a subsequent statement of its reasons for the entry of its orders filed with the Supreme Court of Appeals of West Virginia, cite as statutory authority Chapter 24, Article 2, Sections 2 and 7, and Chapter 24, Article 3, Section 1 of the West Virginia Code, which grant the Commission general regulatory power over utilities.

The order of the Commission was issued on March 6, 1975; the petition for rehearing before the Commission was denied by order issued March 26, 1975; and the petition and supplemental petition for suspension, appeal and review of the said orders were filed in the Supreme Court of Appeals of West Virginia on April 4, 1975 and April 18, 1975, respectively. The order of the Supreme Court of Appeals denying Appalachian's petitions was entered on May 12, 1975. Appalachian filed a supplemental petition based upon new information with that court on June 2, 1975, which petition was denied by order entered June 9, 1975. A notice of appeal was filed with the clerk of the Supreme Court of Appeals of West Virginia on August 5, 1975, a copy of which is included in the Appendix at p. 10a. Subsequently, on August 8, 1975 a notice of appeal was filed with the Public Service Commission of West Virginia, a copy of which is included in the Appendix at p. 11a.

The jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by Title 28, United States Code, Section 1257(2). The following decisions sustain the jurisdiction of the Supreme Court to review the judgment on direct appeal in this case, because the Commission's Order of March 6, 1975 is deemed to be a state "statute" within 28 U.S.C. 1257(2). *Atchison Topeka & Santa Fe Ry. Co.* v. *California Public Utilities Commission,* 346 U.S. 346 (1953); *Bluefield Water Works & Improvements Co.* v. *Public Service Commission of the State of West Virginia,* 262 U.S. 679 (1923); *Lake Erie and Western*

R.R. Co. v. *State Public Utilities Commission of Illinois,* 249 U.S. 422 (1919); *Grand Trunk Western Ry. Co.* v. *Railroad Commission of Indiana,* 221 U.S. 400 (1911).

The orders of May 12 and June 9, 1975 of the West Virginia Supreme Court of Appeals were final orders of the highest court in the state upholding the validity of the state "statute"—the Commission's order of March 6, 1975. *Atchison Topeka & Santa Fe Ry. Co.* v. *California Public Utilities Commission, supra.**

Should, however, the orders of the West Virginia Supreme Court of Appeals not be construed as a judgment by the highest court of the state in which a decision could be had within the meaning of 28 U.S.C. 1257(2), the Company offers in the alternative an appeal from the orders of the Public Service Commission of West Virginia. In that event Appalachian submits that the Commission, by its order of March 26, 1975, denying Appalachian's petition for rehearing, was a "court" within the meaning of 28 U.S.C. 1257(2), and that its decision in favor of the validity of the Commission's order of March 6, 1975, was, therefore, a final judgment rendered by the highest court of the State in which a decision could be had.** See *Prentis* v. *Atlantic Coast Line Co.,* 211 U.S. 210, 224 (1908).

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* The Court has reviewed a *per curiam* denial by a Florida district court of an application for a writ of certoriari to review the determination of the Florida Industrial Commission Unemployment Compensation Board of Review which denial was found to preclude further state review. *Nash* v. *Florida Industrial Commission,* 389 U.S. 235 (1967).

** This position is not inconsistent with the position that the 90-day period within which to seek review commenced on May 12, 1975, the date of the entry of the order of the Supreme Court of Appeals. That appeal was taken as of right under West Virginia Code, Chapter 24, Article 5, Section 1 and clearly could have resulted in an order affecting the rights of the parties as those rights were set forth by the Commission in its orders of March 6, 1975 and March 26, 1975. See *Andrews* v. *Virginian Ry. Co.,* 248 U.S. 272 (1918).

Statute Involved

The statute involved, as that term has been defined by this Court, is the cease and desist order issued on March 6, 1975 by the Public Service Commission of West Virginia in Case No. 8155.

Question Presented

Where Appalachian, pursuant to an approved tariff, initiated on October 1, 1974 the practice of charging for certain service extensions, is an Order of the Commission directing Appalachian to cease and desist from imposing charges for these service extensions and directing Appalachian to refund to its customers such charges collected since October 1, 1974, consistent with the procedural due process requirements of the Fourteenth Amendment of the United States Constitution, where that Order was promulgated without affording Appalachian notice or opportunity to be heard and where that Order was issued in the absence of any evidentiary presentation?

Statement

Appellant, hereinafter referred to as Appalachian, is a wholly-owned subsidiary of the American Electric Power Company, Inc., engaged in the production, transmission and distribution of electric energy in West Virginia and Virginia. The rates which Appalachian charges its customers situated in West Virginia, and the terms and conditions of service affecting those customers, are regulated by the West Virginia Public Service Commission under the provisions of the West Virginia Code, Chapter 24, and the Rules of Practice and Procedure of the Commission.

For some years prior to October 1, 1974, Appalachian followed the practice of providing at its own expense the

"service entrance cable" for new residential customers installing a service entrance switch with a capacity of 100 amperes or more. A "service entrance cable" refers to the electrical cable which runs from the customer's meter to the top of the customer's dwelling, where it is then connected to Appalachian's aerial service cable extending from the distribution pole to the dwelling. New residential customers installing a service entrance switch with a capacity less than 100 amperes, as well as all other classes of customers, have always been required to provide at their own expense this cable or an equivalent entrance conductor.

The Terms and Conditions of Service contained in Appalachian's Tariff on file with the Commission prior and subsequent to October 1, 1974 provide:

> "Where customers install service entrance facilities which have capacity and layout specified by the company and/or install and use certain utilization equipment specified by the company, the company *may provide* or offer to own certain facilities on the customer's side of the point where the service wires attach to the building." (Emphasis supplied.)

Thus, by its terms, the tariff approved by the West Virginia Public Service Commission permitted Appalachian to provide the service entrance cable at its own expense or to charge the customer for such expense.

Effective October 1, 1974, Appalachian changed its practice by requiring *all* customers to install at their own expense the service entrance cable. At the time Appalachian changed its practice, Appalachian did so in the belief that the permissive language contained in the above-quoted tariff provision allowed Appalachian to make the change without any further approval from the Commission. That is, once the Commission had approved that tariff provision, the tariff by its own terms permitted Appalachian to choose whether or not it would continue to provide at

its own expense the service entrance cable. Therefore, no change in the applicable tariff provision governing service entrance facilities was made at the time the Company's policy changed. By its order of March 6, 1975, the Commission, in effect, retroactively changed the permissive character of the tariff to mandate that the Company provide the service entrance cable at its own expense.

The Commission, on March 7, 1975, during continued hearings concerning an entirely separate proceeding (Commission Case No. 7083, Appalachian's request for an increase in electric rates) by Chairman Smith (with Commissioner Gibson present) opened a new proceeding (Case No. 8155) regarding an investigation of Appalachian's service practices. The record in the newly-opened proceeding consisted of 35 pages of transcript and one exhibit. At the beginning of the "hearing" Chairman Smith called the attorneys for Appalachian to the bench and presented an order which required Appalachian to "cease and desist from the practices and charges it began to make on or after October 1, 1974" and to "forthwith refund any . . . charges already paid by its customers for such unapproved practices since October 1, 1974." After having given the parties a chance to read the order, the Chairman referred to various complaints which presumably served as a basis for the cease and desist order. None of the alleged complaints was made available to Appalachian before the hearing (Transcript of hearing of March 7, 1975 in Case No. 8155 before the Public Service Commission of West Virginia, pp. 3-7, hereinafter "Tr. ").

The Chairman directed the Secretary of the Commission to provide Appalachian with a list of complainants so that the Company could satisfy the complaints and report to the Commission. He noted that where Appalachian felt the complaints were inappropriate "we can set that down for formal hearing on those particular individual cases" (Tr. 10).

The Chairman, after having provided the background information for the order, stated that the Commission would be glad to take any questions or statements before passing on to Case No. 7083, the rate proceeding (Tr. 10-11).

Appalachian's counsel, Charles R. McElwee, Esq., said that it was Appalachian's understanding that the hearing was called in order to allow the Company to respond to a Commission question concerning a wholly different service matter. The Chairman stated that since the date the hearing was set, the Commission had discovered the problem dealt with in its cease and desist order (Tr. 12-13).

Mr. Vaughan, the Executive Vice President of Appalachian, then testified with respect to the service matter for which the hearing was called (Tr. 14-21). After Mr. Vaughan's testimony, Mr. McElwee asked the Chairman for time to analyze and respond to the cease and desist order (Tr. 23-25). The Chairman stated:

> "You are free to take as little or as much time as you want to on that, just so long as you abide by the order" (Tr. 25).

Commissioner Gibson then questioned Mr. Vaughan on the service matter dealt with in the cease and desist order, a matter to which Mr. Vaughan noted he was not prepared to respond, although he did so to the best of his ability (Tr. 28-30).

It is plain from the transcript that the Commission had given little consideration to its action. For example, Chairman Smith's first question to Mr. Vaughan, was as follows:

> "Would you explain again your policy before October 1, 1974, with regard to the 'service entrance cable' which I understand runs from the meter base up to what point?" (Tr. 30).

The fact that the order was dated March 6, 1975, one day before the "hearing" during which the Company became aware of it, is indicative of the nature of the Commission proceeding. It is also noteworthy that the witness who testified came prepared, at the Commission's request, to present evidence on another matter. Finally, the Chairman's questions indicated that even the Commission had not given thorough consideration to its action.

On March 14, 1975, Appalachian filed with the Commission a petition for rehearing, reconsideration, reargument, rescission, revocation and modification. This petition stated as the first ground for Appalachian's action that the "Commission's order of March 6, 1975, was entered without notice to or opportunity to be heard by Appalachian in violation of the due process clause[s] of the Fourteenth Amendment to the Federal Constitution . . ." On March 26, 1975 by its denial of Appalachian's petition of March 14, 1975 without opinion the Commission rejected Appalachian's constitutional objection.

The same constitutional objection was raised in Appalachian's petition for suspension, appeal and review of the Commission orders filed with the Supreme Court of Appeals of West Virginia on April 4, 1975. The petition stated that the "Commission's order of March 6, 1975 was entered without notice to, or opportunity to be heard by, Appalachian in violation of the due process of clause[s] of the Fourteenth Amendment to the Federal Constitution . . ." The appeal to the Supreme Court of Appeals of West Virginia was brought pursuant to the West Virginia Code, Chapter 24, Article 5, Section 1. Oral argument was had before the court on April 22, 1975. On May 12, 1975, by denying the relief sought in Appalachian's petition (one justice dissenting) the Supreme Court of Appeals rejected Appalachian's constitutional objection.

A supplemental petition seeking clarification of the Commission's intentions with respect to refunds to customers charged for service entrance cables after October 1, 1974 was filed with the Supreme Court of Appeals on June 2, 1975. The aforesaid constitutional objection was repeated in that petition, wherein the Company referred to its April 4 petition and stated "that the Commission's cease and desist and refund order of March 6 is void because it was entered without notice to, or opportunity to be heard by, Appalachian in violation of the state and federal constitutions . . ." The court denied such petition by order dated June 9, 1975.

The Question Is Substantial

Preliminary Statement

As an elementary proposition, the Fourteenth Amendment requires that at some time before one is finally deprived of his property, he must be accorded due process of law. This case deals with procedural due process, that is, the right to notice and opportunity to be heard on matters affecting one's vested rights. It has long been settled that an administrative proceeding of a quasi-judicial character carries with it the fundamental procedural requirement of a full hearing in which evidence is received and weighed by the trier of facts. *Ohio Bell Telephone Co.* v. *Public Utilities Commission of Ohio,* 301 U.S. 292, 304-5 (1937) and cases cited therein; *Morgan* v. *United States,* 298 U.S. 468, 480 (1936).

Without providing notice to or meaningful opportunity to be heard by Appalachian, the West Virginia Public Service Commission ordered Appalachian to cease and desist certain practices and to refund monies collected as a result of those practices.* Appalachian merely seeks the opportunity to present its case to the Commission, demonstrating the impact of the order and detailing the reasons why it believes the order is improper. The Court has found that:

> "A hearing in its very essence demands that he who is entitled to it shall have the right to support his allegations by argument, however brief, and, if need be, by proof, however informal." *Londoner* v. *Denver,* 210 U.S. 373, 386 (1908).

Appalachian believes that the procedure followed by the Commission and the West Virginia Supreme Court of Appeals in this case has denied it the basic right to a hearing and may set a dangerous precedent for similar actions in the future. Although administrative powers may be far-reaching and judicial review may be limited, the Constitution of the United States guarantees to both individuals and corporations certain fundamental rights. Procedural due process has been the mainstay of those rights. The resolution of this issue in this case transcends state boundary lines and is vital to the protection of virtually every business in the country subject to administrative regulation.

Review by Direct Appeal

The cases supporting the Company's position that this appeal may be brought directly under 28 U.S.C. § 1257(2) are *Atchison Topeka & Santa Fe Ry. Co.* v. *California Public Utilities Commission,* 346 U.S. 346 (1953), *Bluefield Water Works & Improvements Co.* v. *West Virginia Public Service Commission,* 262 U.S. 679 (1923), *Lake Erie and Western R.R. Co.* v. *State Public Utilities Commission of Illinois,* 249 U.S. 422 (1919), and *Grand Trunk Western Ry. Co.* v. *Railroad Commission of Indiana,* 221 U.S. 400 (1911).

In the *Atchison* case, the California Commission issued orders requiring installation of grade separations at cer-

* The Supreme Court of Appeals of West Virginia has held that the jurisdiction of the Commission is limited to prescribing rates and practices to be applied in the *future* and that it has no jurisdiction to award reparations for past injuries. *Wheeling Steel Corporation* v. *Public Service Commission,* 90 W. Va. 74, 110 S.E. 489 (1922).

tain railroad crossings and allocating part of their cost to the appellant under provisions of the California Code. On petitions to the Supreme Court of California that court denied review of the Commission orders. On appeal, this Court said:

> "We think the Commission's orders must be treated as an act of the legislature for purposes of determining our jurisdiction under 28 U.S.C. § 1257(2)." 346 U.S. at 348.

The Court noted that the appellants had presented squarely to the Supreme Court of California their contention that in the allocation of costs, the orders had taken appellant's property without due process of law and that in sustaining the Commission's orders by denying writs of review, the Supreme Court of California had upheld the statute as applied by the Commission, and the case was therefore properly before the Supreme Court of the United States on appeal.

In the *Lake Erie* case, the Court held that an order by the Illinois Commission, requiring the appellant to maintain a certain railway siding "being legislative in its nature, and made by an instrumentality of the State, is a state law within the meaning of the Constitution of the United States and the laws of Congress regulating our jurisdiction." 249 U.S. at 424.

In the *Bluefield* case, the Court decided that the validity of an order prescribing rates may be reviewed on direct appeal. Said the Court:

> "The prescribing of rates is a legislative act. The commission is an instrumentality of the State, exercising delegated powers. Its order is of the same force as would be a like enactment by the legislature. If, as alleged, the prescribed rates are confiscatory, the order is void. Plaintiff in error is entitled to bring the case here on writ of error* and

* The writ of error is the forerunner of the current direct appeal provided for in 28 U.S.C. § 1257(2).

> to have that question decided by this Court. 262 U.S. at 683.

In the *Grand Trunk* case, the Indiana Commission ordered the installation of an interlocking safety device at the intersection of two railroads and allocated the costs in a manner contrary to the provisions of a prior contract between the two roads. The case reached the Court pursuant to a writ of error. The Court observed that the order "is a legislative act by an instrumentality of the State exercising delegated authority . . . and is of the same force as if made by the legislature . . ." 221 U.S. at 403. The Court proceeded to decide the constitutional issues involved.

While commission action may be deemed "legislative" for purposes of determining Supreme Court jurisdiction, Appalachian believes that that same action may be considered "quasi-judicial" in nature in assessing the order's impact upon the appellant for purposes of determining whether due process must be accorded appellant. In fact, this proposition is subsumed in *Ohio Bell Telephone Co.* v. *Public Utilities Commission of Ohio,* 301 U.S. 292 (1937) considered below.

Discussion

The issue involved in this case is rather simple and has been considered on several occasions by the Supreme Court.

In *Ohio Bell Telephone Co.* v. *Public Utilities Commission of Ohio, supra,* the Court reviewed on direct appeal an Ohio Public Utilities Commission decision ordering refunds as a result of a determination of property values based upon the strength of information secretly collected and not disclosed to the company. The company protested and asked for disclosure of the evidence and the opportunity to

analyze and rebut it. The Commission refused and, upon the strength of the unknown documents, ordered millions of dollars of refunds, reporting its conclusions, but not the underlying proofs.

The Court held that:

> "The fundamentals of a trial were denied to the appellant when rates previously collected were ordered to be refunded upon the strength of evidential facts not spread upon the record. * * * This is not the fair hearing essential to due process. It is condemnation without trial." 301 U.S. at 300.

The Court questioned how it was possible for the appellate court to review the law and the facts and intelligently decide that the findings of the Commission were supported by the evidence when the evidence that it approved was unknown and unknowable. 301 U.S. at 303.

It was emphasized that because regulatory commissions have been invested with broad powers within the sphere of duty assigned to them by law "[a]ll the more insistent is the need . . . that the 'inexorable safeguard' . . . of a fair and open hearing be maintained in its integrity." 301 U.S. at 304.

The Court also said:

> "There can be no compromise on the footing of convenience or expediency, or because of a natural desire to be rid of harrassing delay, when that minimal requirement has been neglected or ignored." 301 U.S. at 305.

To the same effect is *West Ohio Gas Co.* v. *Public Utilities Commission of Ohio (No. 1)*, 294 U.S. 63 (1935). In that case, on the eve of a final rate determination, the Ohio Commission, by *ex parte* order, directed that certain annual reports of the company be introduced into evidence and

made a part of the record. On the basis of these reports, the Commission determined what it felt would be a proper amount of expenses to be allocated to the rates charged in one community. The Court found:

> ". . . the weakness of the case for the appellee [Commission] is that the fundamentals of a fair hearing were not conceded to the company. Opportunity did not exist to supplement or explain the annual reports as to the distribution of the expenses in the neighboring communities, nor did opportunity exist to bring the rates outside of Lima into harmony with the exigencies of a new method of allocation adopted without warning." 294 U.S. at 70.

The Court held that division on one basis in one community and on another basis in a different community, all without notice to the company that the spread was to be altered and the new evidence received, "was an exercise of arbitrary power, at variance with 'the rudiments of fair play' . . . long known to our law. The Fourteenth Amendment condemns such methods and defeats them." 294 U.S. at 71.

A similar decision was reached in *United States* v. *Abilene & Southern Ry. Co.*, 265 U.S. 274 (1924), where the Court struck down an ICC order relating to division of interstate joint rates. The Commission considered without placing into evidence certain annual reports filed with it by plaintiff carriers. The Court found that the Commision was under an obligation to introduce by specific reference such parts of the reports it wished to treat as evidence. The Court, noting that the objection to the use of the data contained in the reports was not lack of authenticity or untrustworthiness, stated:

> "It is that the carriers were left without notice of the evidence with which they were, in fact, confronted, as later disclosed by the finding made. The

requirement that in an adversary proceeding specific reference be made is essential to the preservation of the substantial rights of the parties." 265 U.S. at 289.

In the second *Morgan* case, *Morgan* v. *United States,* 304 U.S. 1 (1938), the Court held constitutionally defective the administrative procedure followed by the Secretary of Agriculture in fixing certain rates because the persons to be affected by the order were found not to have been adequately apprised of what the Secretary proposed to do prior to the time he actually did it. Said the Court:

> "Those who are brought into contest with the Government in a quasi-judicial proceeding aimed at the control of their activities are entitled to be fairly advised of what the Government proposes and to be heard upon its proposals before it issues its final command." 304 U.S. at 18-19.

Moreover, the Court has stricken down arguments that administrative findings in the absence of supporting evidence are presumed to have been supported by information available to the agency and cannot be set aside where the agency after a hearing merely states that, in its opinion, the rates were unreasonable. *Interstate Commerce Commission* v. *Louisville & Nashville R.R. Co.,* 227 U.S. 88 (1913). The Court found that such a construction would nullify the right to a hearing—

> "for manifestly there is no hearing when the party does not know what evidence is offered or considered and is not given an opportunity to test, explain, or refute." 227 U.S. at 93.

The Court went on to say:

> "All parties must be fully apprised of the evidence submitted or to be considered, and must be given the opportunity to cross-examine witnesses, to inspect documents and to offer evidence in explanation or rebuttal. In no other way can a party maintain its rights or make its defense. In no other way can it test the sufficiency of the facts to support the finding; for otherwise, even though it appeared that the order was without evidence, the manifest deficiency could always be explained on the theory that the Commission had before it extraneous, unknown but presumptively sufficient information to support the finding." 227 U.S. at 93-94.

The Court has spoken of certain principles which have remained "relatively immutable in our jurisprudence." Chief Justice Warren, speaking for the Court, said "This Court has been zealous to protect these rights from erosion . . . not only in criminal cases . . . but also in all types of cases where administrative and regulatory actions were under scrutiny." *Greene* v. *McElroy,* 360 U.S. 474, 496-7 (1959).

The Court noted that one of these immutable principles is that where governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue. *Id.* at 496.

Conclusion

The gravity of the claim in this case is apparent. It involves traditional concepts of constitutional law and the

necessary safeguards for fair and open administrative procedures. The matter is of great public importance and requires plenary consideration by the Court.

Respectfully submitted,

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August 8, 1975

APPENDIX

STATE OF WEST VIRGINIA

At a Regular Term of the Supreme Court of Appeals continued and held at Charleston, Kanawha County, on the 12th day of May, 1975, the following order was made and entered, to-wit:

(P.S.C. Case No 8155)

APPALACHIAN POWER COMPANY, a corporation

vs.

THE PUBLIC SERVICE COMMISSION OF WEST VIRGINIA

Upon an appeal from, suspension and review of the final orders of the Public Service Commission of West Virginia made and entered on the 6th day of March and the 26th day of March, 1975.

The Court, having maturely considered the petition and exhibits, note of argument in support thereof; supplemental petition and note of argument in support thereof; the record consisting of all papers, documents and evidence which were before the Public Service Commission at the hearing which resulted in the entry of the final orders complained of; the statement of reasons for the entry of its orders of the 6th and 26th days of March, 1975, filed herein by the respondent, Public Service Commission of West Virginia, on April 22, 1975; and the oral argument of counsel on the 22d day of April, 1975, the date fixed by the Court for hearing upon the aforesaid petition and supplemental petition; a majority of the Court is of opinion that the petitioner has not shown itself entitled to the relief prayed for in its said petition. It is therefore considered and ordered that the prayer of the petition for an appeal from, suspension and review, in

this proceeding, be, and the same is hereby denied. Justice Caplan would grant. Justice Berry, deeming himself disqualified, did not participate.

It is further ordered that leave be, and the same is hereby granted to the Public Service Commission of West Virginia to withdraw from the office of the Clerk of this Court, the record consisting of all papers, documents and evidence originally filed with the Public Service Commission of West Virginia.

A True Copy

Attest: GEORGE W. SINGLETON
Clerk Supreme Court of Appeals

STATE OF WEST VIRGINIA

At a Regular Term of the Supreme Court of Appeals continued and held at Charleston, Kanawha County, on the 9th day of June, 1975, the following order was made and entered, to-wit:

P.S.C Case No. 8155

APPALACHIAN POWER COMPANY, a corporation

vs.

THE PUBLIC SERVICE COMMISSION OF WEST VIRGINIA

On a former day to-wit, June 2, 1975, came the petitioner, Appalachian Power Company, a corporation, by James, Wise, Robinson & Magnuson and Charles R. McElwee, its attorneys, and presented to the Court its supplemental petition praying for an appeal from, suspension and review of the final orders of the Public Service Commission of West Virginia made and entered on the 6th and 26th days of March, 1975, in Case No. 8155, which being seen and inspected by the Court the supplemental petition aforesaid is refused. Justice Berry deeming himself disqualified, did not participate.

A True Copy

Attest: GEORGE W. SINGLETON
Clerk Supreme Court of Appeals

PUBLIC SERVICE COMMISSION
OF WEST VIRGINIA
CHARLESTON

At a session of the PUBLIC SERVICE COMMISSION OF WEST VIRGINIA, at the Capitol in the City of Charleston on the 6th day of March, 1975.

Case No. 8155

APPALACHIAN POWER COMPANY, a corporation.

Investigation of service practices and charges.
Proceeding on motion of the Commission.

WHEREAS, between the dates of February 11, 1975, and the date of this order, the Commission has received more than 85 complaints that Appalachian Power Company, a corporation, (Appalachian) has and is requiring all of its customers, including residential, commercial and industrial customers, to pay all costs in connection with rendering new, changed or additional service in advance of construction as a non-refundable contribution in the amount of the investment required to construct, install or change the facilities of Appalachian to render such service; and

WHEREAS, pursuant to (a) Rules 29 and 30 of the Commission's Rules and Regulations for the Government of Electric Utilities; (b) Appalachian's effective tariffs on file with this Commission; and (c) Appalachian's practices and charges or lack of charges prior to October 1, 1974, all or a substantial part of said construction, installation or change on Appalachian's side of the customer's service outlet or meter base, back to Appalachian's distribution or transmission line, are to be paid for and have previously been paid for by Appalachian; and

WHEREAS, by letter dated February 6, 1975, addressed to "West Virginia Public Service Commission" Appalachian through John W. Vaughan, its Executive Vice President, advised that Appalachian was putting into effect on February 10, 1975, certain practices purporting to relate to extensions and expansions of service and purporting to be implemented pursuant to Section "Extension of Service" of Appalachian's tariff, Original Sheet No. 4 of P.S.C. W. Va. No. 2, and this change in practices and charges was due to a "serious erosion of its earnings"; and

WHEREAS, Appalachian sought to impose upon its customers a written form of agreement whereby the customer seeking electric service was to be forced to pay all the cost of providing electric facilities in an amount to be set by Appalachian and which purported to be "under the Company's standard Terms and Conditions of Service as regularly filed with the Public Service Commission of West Virginia," but which is not so provided therein; and

WHEREAS, the Commission infers from these representations by Appalachian and its officers and those reportedly made by its employees and agents that the purpose of this new policy of service practices and charges was made to bring pressure on the Commission to accede to the rate requests of Appalachian, and that these allegations, if true, would constitute a violation of Appalachian's duty as a public utility; and

WHEREAS, unilaterally and without the prior consent of this Commission, Appalachian has changed its policy of service and charges to all its customers and has not filed with the Commission an application or tariff changes for approval of such service charges, as required by law.

IT IS, THEREFORE, ORDERED that Appalachian Power Company cease and desist from the practices and charges it began to make on or after October 1, 1974, which are not provided for (a) in Rule 29 of the Commission's Rules and Regulations for the Government of Electric Utilities; (b) the effective tariff sheets of Appalachian Power Company; or (c) which were not its actual practice and charges for construction, installation or change prior to October 1, 1974.

IT IS FURTHER ORDERED that Appalachian Power Company shall forthwith refund any of such charges already paid by its customers for such unapproved practices since October 1, 1974.

IT IS FURTHER ORDERED that the Secretary of this Commission give Appalachian Power Company a list of the names and addresses of the many complainants who have made or will make formal or informal complaints with this Commission from February 10, 1975, until further order of the Commission, and that Appalachian Power Company file its written report every Monday, beginning Monday, March 10, 1975, until further order of this Commission, which report shall advise the Commission whether and how it has satisfied the said complainants who are or will be listed to Appalachian Power Company by this Commission.

Teste:

S. GROVER SMITH, JR.,
Secretary

PUBLIC SERVICE COMMISSION
OF WEST VIRGINIA
CHARLESTON

At a session of the PUBLIC SERVICE COMMISSION OF WEST VIRGINIA, at the Capitol in the City of Charleston on the 26th day of March, 1975.

CASE NO. 8155

APPALACHIAN POWER COMPANY, a corporation.

Investigation of service practices and charges.
Proceeding on motion of the Commission.

ORDER DENYING PETITION FOR REHEARING, RECONSIDERATION, REARGUMENT, RESCISSION, REVOCATION AND MODIFICATION FILED ON BEHALF OF APPALACHIAN POWER COMPANY

On March 14, 1975, Appalachian Power Company filed its "Petition for Rehearing, Reconsideration, Reargument, Rescission, Revocation and Modification" of the order of the Commission issued on March 6, 1975, in which Appalachian Power Company was ordered to cease and desist from violating the law as to certain practices and charges which were unilaterally changed from that existing prior to October 1, 1974, without the prior approval of the Commission. The cease and desist order also required Appalachian to refund any of such charges already paid by its customers for such unapproved practices since October 1, 1974, and ordered weekly reporting of the compliance of Appalachian Power Company with its said order issued March 6, 1975.

The said Petition for hearing alleges that (1) our order was issued without notice or opportunity to be heard by

Appalachian, (2) without statutory authority, and (3) without findings based on evidence.

These grounds are rejected as a matter of law, because Appalachian Power Company has admitted that it changed its practices in effect before October 1, 1974, without the prior approval of this Commission as required by law under pertinent governing statutes, rules, and regulations. Under Code 24-2-2, the Commission is given the broad power to require public utilities to conform to the laws of West Virginia and to all rules, regulations and orders of the Commission.

In addition, in its Petition for Rehearing, Reconsideration, Reargument, Rescission, Revocation and Modification, Appalachian Power Company denied that its employees or agents made any representations from which the Commission could infer that Appalachian was unilaterally changing its practices and charges so as to bring pressure on the Commission to accede to the rate requests of the utility. However, at the oral argument on Appalachian's petitions for rehearing in its contemporaneous general rate case, No. 7083, Appalachian made the argument that rate relief was needed to permit it to perform its public utility obligations; that is, to make transformer, line, and other installations necessary to serve new customers or the increased power needs of existing customers. This alone supports the inferences which the Commission received from the representations of employees and agents of Appalachian, regardless of equally specific data contained in the more than 85 complaints received by the Commission and referred to in the Commission's cease and desist order.

The record made in this case supports the order of March 6, 1975, in defining the practices and charges existing prior to October 1, 1974, which Appalachian improperly changed

and which are specifically within the knowledge of Appalachian.

The other allegations in the petition for rehearing herein are likewise without basis in law and fact and are hereby rejected.

ORDER

The Commission hereby affirms its cease and desist order issued herein on March 6, 1975, and denies the Petition for Rehearing, Reconsideration, Reargument, Rescission, Revocation and Modification filed on March 14, 1975, on behalf of Appalachian Power Company.

Teste:

S. Grover Smith, Jr.,
Secretary

IN THE

SUPREME COURT OF APPEALS OF WEST VIRGINIA

CHARLESTON

(P.S.C. Case No. 8155)

APPALACHIAN POWER COMPANY, a corporation
Appellant,

v.

PUBLIC SERVICE COMMISSION OF WEST VIRGINIA,
Appellee.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Appalachian Power Company, the appellant in the above-captioned proceeding, hereby appeals to the Supreme Court of the United States from the final order of the Supreme Court of Appeals of the State of West Virginia, entered in this action on May 12, 1975, affirming orders of the Public Service Commission of West Virginia issued on March 6, 1975 and March 26, 1975.

This appeal is taken pursuant to 28 U.S.C. §1257(2).

Dated: August 5, 1975.

CHARLES R. MCELWEE
Counsel for Appalachian Power Company,
Appellant

FILED
AUG. 5, 1975
GEORGE W. SINGLETON
Clerk of the Supreme Court of Appeals of West Virginia

PUBLIC SERVICE COMMISSION OF WEST VIRGINIA

CHARLESTON

(P.S.C. Case No. 8155)

APPALACHIAN POWER COMPANY, a corporation,
Appellant,

v.

PUBLIC SERVICE COMMISSION OF WEST VIRGINIA,
Appellee.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Appalachian Power Company, the appellant in the above-captioned proceeding, hereby appeals to the Supreme Court of the United States from the final orders of the Public Service Commission of West Virginia, entered in this action on March 6, 1975 and March 26, 1975, review of said orders having been denied by the Supreme Court of Appeals of West Virginia by its orders of May 12, 1975, and June 9, 1975.

This appeal is taken pursuant to 28 U.S.C. §1257(2).

Dated: August 7, 1975.

CHARLES R. MCELWEE
Counsel for Appalachian Power Company,
Appellant

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SECRETARY'S OFFICE

Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1975

No. 75-207

APPALACHIAN POWER COMPANY,
Appellant

v.

THE PUBLIC SERVICE COMMISSION OF WEST VIRGINIA
Appellee.

ON APPEAL FROM THE SUPREME COURT
OF APPEALS OF THE STATE OF WEST VIRGINIA

MOTION TO DISMISS OR AFFIRM

E. DANDRIDGE MCDONALD
Attorney for Appellee
E-214 State Capitol
Charleston, West Virginia 25305

September 30, 1975

JARRETT PRINTING COMPANY, CHARLESTON, W. VA.

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IN THE

Supreme Court of the United States

October Term, 1975

No. 75-207

APPALACHIAN POWER COMPANY,
Appellant

v.

THE PUBLIC SERVICE COMMISSION OF WEST VIRGINIA
Appellee.

ON APPEAL FROM THE SUPREME COURT OF APPEALS OF THE STATE OF WEST VIRGINIA

MOTION TO DISMISS OR AFFIRM

The Appellee, Public Service Commission of West Virginia, pursuant to Rule 16 of the Rules of the Supreme Court of the United States, moves the Court to dismiss the appeal herein or, in the alternative, to affirm the judgment of the Supreme Court of Appeals of the State of West Virginia, on the grounds that (1) it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument; (2) the decision of the case below rests on adequate non-federal grounds; and (3) Appellant has failed to exhaust its state administrative remedies.

I.

THE COMMISSION ORDER INVOLVED AND THE NATURE OF THE CASE

THE PROCEDURAL HISTORY PRECEDING THE ORDER COMPLAINED OF

This appeal raises the question of the validity of the procedure by which the Public Service Commission of West Virginia ("Commission") handed down an order on March 7, 1975, in its Case No. 8155. The Commission believes that a complete statement of the facts is necessary for an understanding of the matters herein.

For some time prior to October 1, 1974, Appalachian Power Company ("Appalachian") followed the practice of furnishing the "service entrance cable" for new residential customers having a service entrance switch with a capacity of 100 amperes or more (Tr. Case 8155, March 7, 1975, pp. 31, 33-34; hereinafter "Tr. ____ "). The "service entrance cable" is the wire running from the meter base on a residential customer's dwelling to the top of the house, where it connects with the company's aerial service drop running to the distribution pole. If the residential customer did not have a service entrance switch with a capacity of 100 amperes or more, Appalachian did not furnish the service entrance cable. However, after October 1, 1974, Appalachian, without Commission approval, changed this policy and required all residential customers to provide the service entrance cable at their own expense, regardless whether they had a 100 amphere entrance switch or not (Tr. 21, 29-30). Commercial and industrial customers have apparently always provided the service entrance cable (Tr. 31, 34-35).

Appalachian's change in policy effective October 1, 1974, will be referred to as the "service entrance cable policy."

On February 10, 1975, the Commission received a letter[1] dated February 6, 1975, from John W. Vaughan, Executive Vice-President of Appalachian, informing the Commission that Appalachian was instituting changes in its practices relating to extensions and expansion of service. (Petition for Rehearing Exh. 4, Case 7083[2]).

This letter said in pertinent part:

> **RESIDENTIAL CUSTOMERS**
>
> The company will continue to install at no cost to the customer the meter and the aerial service drop to the customer's service outlet when the distance from the utility's distribution line to the customer's service outlet is not in excess of 125 feet. All other costs associated with providing service to this class of customers shall be paid for in advance of the construction of such facilities in the form of a non-refundable contribution in the amount of investment required to construct said facilities. The investment will be calculated on the basis of the estimated cost to the company on [sic] constructing its local facilities from the adequate source of power as determined by the company.
>
> **ALL OTHER CUSTOMERS**
>
> Any customer (except residential) that requests service from the company requiring that company

---

[1]Reprinted herein as Appendix I, pp. 1a-2a.

[2]Case No. 7083 is a rate case involving Appalachian. It was during hearings on an Appalachian Petition for Rehearing in that case that the matter of changes in Appalachian's service practices was first raised, for it was in response to a Commission order entered in Case 7083 that Appalachian initiated the change in service practices.

> facilities be extended or expanded shall make payment in advance of the construction of such facilities a non-refundable contribution in the amount of the investment required to construct said facilities. The investment will be calculated on the basis of estimated cost to the company of constructing its local facilities from an adequate source of power as determined by the company and will include the installed cost of all poles, conductors, transformers, switches, protective devices, etc., required to provide adequate service to meet the customer's load requirement.
>
> The above practices are being implemented pursuant to Section "Extension of Service" of Appalachian Power Company's Terms and Conditions of Service, Original Sheet No. 4 of P.S.C. West Virginia No. 2, effective July 29, 1971.

This new policy was represented to be effective February 10, 1975, and will be referred to as the "extension and expansion policy."

On February 21, 1975, the Commission held a hearing on Appalachian's Petition for Rehearing in the rate case, Case No. 7083. The matter of Appalachian's change in its "extension and expansion policy" having come to the attention of the Commission by way of Mr. Vaughan's letter of February 6, and also by way of a multitude of complaints to the Commission (and to Appalachian) from customers affected by the change, the Commission at the February 21 hearing examined Mr. Vaughan and other company witnesses at length concerning the service connection changes (Tr. Case 7083, February 21, 1975, pp. 19-20, 118-135).

On March 7, 1975, the Commission held a further hearing in Case No. 7083 on Appalachian's Petition for Rehearing. Also on that day, it segregated the matter of

Appalachian's change in service practices by assigning it a new case number (Case No. 8155) and directed the reporter to prepare a separate transcript covering the hearing on those matters alone. On that day, there was filed with the Commission and handed to the Chairman a letter (Appalachian Exh. No. 1, Case 8155),[1] dated March 3, 1975, also signed by Mr. Vaughan, which informed the Commission that the letter of February 6, 1975, was being withdrawn, and that Appalachian had reverted to the policy in effect prior to February 10, 1975. Mr. Vaughan testified that "in those instances where we had collected monies, we set in motion a program to refund them . . ." (Tr. 17).

Thus, Appalachian *voluntarily* abandoned the February 10, 1975 extension and expansion policy by its letter of March 3, 1975, and *voluntarily* agreed to refund any monies collected pursuant thereto.[2]

Also on March 7, 1975, the Commission handed down a cease and desist order in Case 8155 directing Appalachian to "cease and desist from the practices and charges it began to make on or after October 1, 1974, which are not provided for (a) in Rule 29 of the Commission's Rules and Regulations for the Government of Electric Utilities; (b) the effective tariff sheets of Appalachian Power Company, or (c) which were not its actual practice and charges for construction, installation or change prior to October 1, 1974." The order further directed Appalachian to refund any charges already paid by its customers for such unapproved practices since October 1, 1974. Clearly, the cease and desist order and the order to refund, insofar

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[1] Reprinted herein as Appendix II, p. 3a.

[2] The Public Service Commission has been informed by Appalachian that all customer complaints arising out of the February 10, 1975 change in its extension and expansion policy have been satisfied, and that all monies collected pursuant thereto have been refunded.

as the February 10, 1975 extension and expansion policy is concerned, are now moot, Appalachian having voluntarily complied with its terms.

It is clear from the record in this case that the October 1, 1974 change in Appalachian's service entrance cable policy did not result in Appalachian's initiating "the practice of charging for certain service extensions", as suggested in the "Question Presented" section on page 5 of Appalachian's Jurisdictional Statement filed herein. Indeed, the transcript of the hearing on March 7, 1975, at page 21, records the following exchange between Appalachian's counsel and Mr. Vaughan:

> Q. Mr. Vaughan, the order of this date in this case, the cease and desist order, orders that Appalachian cease and desist in the practices and charges it began to make on or after October 1, 1974. I think in your earlier response, you made some reference to your knowledge concerning these practices and charges, but are you sufficiently familiar this morning with the practice and charges which the Commission makes reference to respond thereto?
>
> A. No, I am acquainted with the change, obviously, that took place on that date. This change did not result in the customer having to make any additional payment to the company but it did indeed result in the customer having to furnish the service entrance cable that extended from the meter base to the point of attachment at the top of the house.

At another point in the proceedings on that date, and in response to a question by Commissioner Gibson, Mr. Vaughan testified as follows:

> Well, you see, we never charged the man for the cable. We furnish that at no cost to the customer.

> The difference after October 1, is that the customer had to buy a piece of cable and perhaps in most instances pay someone for making the installation of that cable from the meters or put them up to the point of attachment at the top of the house (Tr. 29-30).

Moreover, that Appalachian did not initiate any charge for the service entrance cable on October 1, 1974, is suggested by the following language on page 6 of Appalachian's Jurisdictional Statement herein:

> Effective October 1, 1974, Appalachian changed its practice by requiring *all* customers to install at their own expense the service entrance cable. (Emphasis in original)

In view of the above stated facts and procedure in this case, it is unclear to the Public Service Commission of West Virginia exactly what Appalachian is complaining of in this proceeding. As stated, as far as the Commission is informed, Appalachian did not initiate on October 1, 1974, "the practice of charging for certain service extensions" as suggested by the "Question Presented" section of the Jurisdictional Statement filed herein. The October 1, 1974 service extension policy did not result in any charge to anyone by Appalachian. It merely required all customers to provide the service entrance cable at their own expense. Thus, the Commission order directing Appalachian to cease and desist from imposing charges for these service extensions could not apply to any charges imposed beginning October 1, 1974, because no such charges were made by Appalachian.

If Appalachian is complaining of the cease and desist order insofar as it concerns the charges attempted to be made by Appalachian as a result of the February 10, 1975 change in its extension and expansion policy, the order is

moot since, as stated, Appalachian has voluntarily agreed to abandon that change in policy and to make refunds to its customers therefor.

The "Statement" section of the Jurisdictional Statement beginning on page 5 suggests that Appalachian is complaining of the Commission's cease and desist order insofar as it relates to the service entrance cable policy. However, the cease and desist order requiring Appalachian to stop charges it began to make on or after October 1, 1974, and to refund any such charges already paid by its customers for such unapproved practices since October 1, 1974, did not and could not apply to any charges made by Appalachian with respect to the service entrance cable policy since no charges were ever made by Appalachian under that policy; likewise, no refund could be made. Obviously, the "refund" portion of the cease and desist order applied only to the February 10, 1975 policy change.

In short, the suggestion in the "Question Presented" section of the Jurisdictional Statement, and on page 10 thereof, that the Commission has unconstitutionally ordered refunds, is simply inaccurate: the February 10 refunds have been made and the issue is moot, and there are no refunds in the October 1 matter. Either the writer of Appalachian's Jurisdiction Statement is mistaken about the facts in this case, or Appalachian has changed its policy since March 7, 1975, unbeknownst to the Commission.

In any event, the gravamen of Appalachian's complaint is that it allegedly failed to receive notice and an opportunity for hearing before the March 7, 1975 order was handed down. For several reasons, the Public Service Commission of West Virginia believes Appalachian's

complaints are without merit and that this Court should grant the Commission's Motion to Dismiss or affirm.

II.

ARGUMENT

A. DUE PROCESS REQUIREMENTS HAVING BEEN MET, THIS CASE DOES NOT PRESENT A SUBSTANTIAL FEDERAL QUESTION

Appalachian's assertions that it was denied notice and opportunity to be heard on the question of the change of its prior practice with respect to service entrance cables is simply without merit. In fact, the matter first came to the attention of the Commission through testimony by Mr. Miller Porterfield, Vice-President of Appalachian Power Company, at the hearing on February 21, 1975, in in Case No. 7083 (Tr. 122):

> Q. Before February 10, you paid those costs yourself, isn't that right?
>
> A. That's right.
>
> Q. And how long before February—for years and years?
>
> A. Yes, sir, there's one exception that took place a couple of months ago in regard to service entrance cable when we started looking around where we could save a dollar and the promotional days were over with—we're not allowed to promote and it wasn't necessary, we stopped the service entrance cable. That's from the drop off where the point of attachment to the building is down to the meter. We used to do that, provided there was a certain condition met, but several months ago, due to our economic situation, we did make that

> change at that time about the service entrance. But other than that, we have been following the procedure for many years.

Having admitted that it instituted the October 1, 1974 change in its service entrance cable policy without notice to the Commission, Appalachian cannot complain that it did not have notice of Commission cognizance of the change. Moreover, at the outset of the hearing on March 7, 1975, *before* the cease and desist order was handed down, Mr. Vaughan was questioned concerning Appalachian's basis for its change in service practices. He indicated that Appalachian was relying solely on its tariff (Tr. 3-4). Thereafter, the Commission handed down the cease and desist order.

Neither the discussion that followed the handing down of the cease and desist order on March 7, 1975, nor Appalachian's petition for rehearing, filed March 17, 1975, nor any other pleading or paper Appalachian has filed in this case has raised any new facts that would justify the Commission's reversing its initial decision. Therefore, the Commission feels that Appalachian has been afforded ample notice and opportunity for hearing, on two occasions, on the question of the change in its service entrance cable policy. *Opp Cotton Mills* v. *Administrator,* 312 U.S. 126 (1941).

Further, the Commission does not believe that Appalachian has been deprived of its property in any manner in this case. While it was ordered to supply the service entrance cable for qualified new residential customers on and after March 7, 1975, this was no change from Appalachian's practice prior to October 1, 1974. The March 7, 1975 order did not require Appalachian to make *reimbursement* to those customers who had been required

by Appalachian to furnish their own service entrance cable after October 1, 1974. Such question, if it arises, will be dealt with as necessary.

Appalachian has been afforded notice and a full evidentiary hearing on the matter, and no question, federal or otherwise, has been raised that would merit the plenary consideration of the United States Supreme Court.

If Appalachian is complaining that the cease and desist order was handed down prior to further discussion of the matter on March 7, 1975, the complaint has no merit. Due process does not require that the hearing in this type proceeding, where the Appellant admitted the essential fact of wrong-doing, be completed before the order is entered. "The very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation. *Federal Communications Commission* v. *WJR Goodwill Station, Inc.,* 337 U.S. 265, 275, 276 (1949); *Hannah* v. *Larche,* 363 U.S. 420, 440, 442 (1960); *Hagar* v. *Reclamation District,* 111 U.S. 701, 708 (1884)." *Cafeteria and Restaurant Workers Union* v. *McElroy,* 367 U. S. 886, 895 (1961).

B. THE DECISION OF THE CASE BELOW RESTS ON ADEQUATE NON-FEDERAL GROUNDS

Chapter 24, Article 2, Section 2 of the West Virginia Code, 1931, as amended (hereinafter "Code"), states in relevant part:

> The Commission is hereby given power to investigate all . . . methods and practices of public utilities . . .; to acquire them to conform to the laws of this State and to all rules, regulations and orders of the commission not contrary to law . . . .

The commission may . . . change or prohibit any practice, device or method of service in order to prevent undue discrimination or favoritism between persons and between localities and between commodities for a like and contemporaneous service. . . .

Code 24-2-7 states in relevant part:

Whenever, under the provisions of this chapter, the commission shall find any . . . practices, acts or service to be unjust, unreasonable, insufficient or unjustly discriminatory, or otherwise in violation of any provisions of this chapter . . . the commission shall determine and declare, and by order fix, reasonable . . . regulations, acts, practices or service, to be furnished, imposed, observed and followed in the State in lieu of those found to be unjust, unreasonable, insufficient, or unjustly discriminatory, inadequate or otherwise in violation of this chapter, and shall make such other order respecting the same as shall be just and reasonable.

Code 24-3-1 states in relevant part:

Every public utility subject to this chapter shall established and maintain adequate and suitable facilities, safety appliances or other suitable devices, and shall perform such service in respect thereto as shall be reasonable, safe and sufficient for the security and convenience of the public . . . and in all respects just and fair, and without any unjust discrimination or preference. All charges, tolls and rates shall be just and reasonable, and no change shall be made in any tariffs, rates, joint rates, tolls, schedules or classifications except as herein provided . . . No . . . public utility shall discontinue any . . . public service facility . . . without first obtaining authority from the commission to do so, unless the same be done under

uniform rules and regulations filed by such . . . public utility with the public service commission and approved by said commission.

The sections cited above give the Commission ample statutory authority to control the facilities, charges and services of public service corporations. "The only limitation upon this authority is that the requirements shall not be contrary to law, and that they shall be 'just and fair', 'just and reasonable' and 'just and proper'." *United Fuel Gas Company* v. *Public Service Commission*, 103 W. Va. 306, 310 (1927). The evidence is undisputed that for years prior to October 1, 1974, the company provided the service entrance cable for customers with 100 ampere entrance switches. This practice was authorized by Rule 29(b) (2) of the Commission's Rules and Regulations for the Government of Electric Utilities, which states:

Nothing contained herein shall be construed so as to prohibit a utility from making at its expense, greater extensions to its facilities than set out herein, should its judgment so dictate, provided like extensions are made to other customers under similar conditions.

On October 1, 1974, the company changed its policy by requiring all customers to provide and install the service entrance cable. There was no notice to the Commission of such change as required by Code 24-3-1, *supra*. The West Virginia Supreme Court of Appeals, in a case involving the continued maintenance of a railroad crossing, has stated:

May not a facility agreed to and continued for so many years for the accommodation of shippers be regarded as reasonable, and the continuance thereof justified? We think so, upon the principle laid

down in *State ex rel.* v *White Oak Railway Company*, 65 W. Va. 15 (1909).

Norfolk & Western Railway Company v. *Public Service Commission*, 91 W. Va. 414, 419-20 (1922).

Since Appalachian had held itself out to perform certain services for the public before October 1, 1974, it must, under the law, request authority from the Commission before discontinuing such practices. Code 24-2-2; 24-2-7; 24-3-1; Rule 29 (b), *Rules and Regulations for the Government of Electric Utilities, supra; Norfolk & Western Railway Company* v. *Public Service Commission, supra.*

C. APPELLANT HAS FAILED TO EXHAUST ITS STATE ADMINISTRATIVE REMEDIES

Appalachian is attempting to accomplish through the judicial system what it has never sought to do in a proper administrative procedure before the Public Service Commission. The company having established a long-standing practice of providing the service entrance cable for qualified new residential customers, it cannot simply change that policy without Commission approval. Rule 29 (b) (2), *Rules and Regulations for the Government of Electric Utilities, supra; Norfolk & Western Railway Company* v. *Public Service Commission, supra.* The proper method of changing such a long established procedure is to apply to the Public Service Commission for authority to do so.[1] The order complained of in no way precludes such a filing; indeed, the company was encouraged to make the application (Tr. 8-9).

[1] "No . . . public utility shall discontinue any . . . public service facility . . . without first obtaining authority from the Commission to do so, unless the same be done under uniform rules and regulations filed by such . . . public utility with the public service commission and approval by said commission." Code 24-3-1.

Accordingly, the proper forum for the resolution of this dispute is the Public Service Commission, upon proper application by Appalachian. Not only has Appellant failed to exhaust its administrative remedies, it has failed even to institute them.

CONCLUSION

For all of the above stated reasons, Appellee Public Service Commission of West Virginia urges this Court to grant its Motion to Dismiss or Affirm herein.

Respectfully submitted,

E. DANDRIDGE MCDONALD,
Attorney for Appellee
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September 30, 1975

APPENDIX I

February 6, 1975

West Virginia Public Service Commission
Charleston, West Virginia 25305
Gentlemen:

Because of a serious erosion in its earnings, Appalachian Power Company does not have the financial capability to invest more funds in new construction and the revenue from its existing rates are not sufficient to meet all the cost of providing service including interest on current debt and other obligations.

The interest coverage which is necessary to sell new, long-term debt under our mortgage indenture is virtually non-existent at this time, and our financing ability was further encumbered when we learned on February 4, 1975, that the Moody's Investors Service, Inc., had downgraded our first mortgage bonds and preferred stock from "A" to "Baa" and debentures and pollution control bonds from "Baa" to "Ba." In view of this, Appalachian Power Company hereby advises the Commission that it is putting into effect on February 10, 1975, the following practices relating to extensions and expansions of service:

RESIDENTIAL CUSTOMERS

The company will continue to install at no cost to the customer the meter and the aerial service drop to the customer's service outlet when the distance from the utility's distribution line to the customer's service outlet is not in excess of 125 feet. All other costs associated with providing service to this class of customers shall be paid for in advance of the construction of such facilities in the form of a non-refundable contribution in the

amount of investment required to construct said facilities. The investment will be calculated on the basis of the estimated cost to the company on constructing its local facilities from an adequate source of power as determined by the company.

ALL OTHER CUSTOMERS

Any customer (except residential) that requests service from the company requiring that company facilities be extended or expanded shall make payment in advance of the construction of such facilities a non-refundable contribution in the amount of the investment required to construct said facilities. The investment will be calculated on the basis of estimated cost to the company of constructing its local facilities from an adequate source of power as determined by the company and will include the installed cost of all poles, conductors, transformers, switches, protective devices, etc., required to provide adequate service to meet the customer's load requirement.

The above practices are being implemented pursuant to Section "Extension of Service" of Appalachian Power Company's Terms and Conditions of Service, Original Sheet No. 4 of P.S.C. West Virginia No. 2, effective July 29, 1971.

Sincerely,

JOHN W. VAUGHAN
Executive Vice President

APPENDIX II

March 3, 1975

Honorable Brooks E. Smith, Chairman
West Virginia Public Service Commission
Charleston, West Virginia

Dear Chairman Smith:

Following the discussion on February 21, 1975, we have reviewed the policy for connecting customers and accommodating increases in loads as set forth in my letter to the Commission dated February 6, 1975.

This will advise that this letter is being withdrawn, and we shall revert to the policy in effect prior to February 10, 1975.

You will understand, of course, that this is with full reservation of all our rights under our tariffs and statutes governing our operation in the State of West Virginia.

Sincerely,

JOHN W. VAUGHAN
Executive Vice President

Supreme Court, U. S.
FILED
OCT 7 1975
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-207

APPALACHIAN POWER COMPANY,
Appellant,

v.

THE PUBLIC SERVICE COMMISSION OF WEST VIRGINIA,
Appellee.

ON APPEAL FROM THE SUPREME COURT OF APPEALS
OF THE STATE OF WEST VIRGINIA

BRIEF OPPOSING MOTION TO DISMISS OR AFFIRM

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October 7, 1975

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BRIEF OPPOSING MOTION TO DISMISS OR AFFIRM

Introduction

Appalachian Power Company ("Appellant" or "Appalachian") submitted its Jurisdictional Statement in this matter to the Court on August 8, 1975. Appellee's Motion to Dismiss or Affirm, filed on September 30, 1975, introduces irrelevant materials and attempts to rehabilitate the wholly inadequate state procedure by speculating upon the inarticulated rationale relied upon by the Supreme Court of Appeals of West Virginia. At no place does Appellee deny that Appalachian's practice, which became effective October 1, 1974 of requiring all customers to install at their own expense the service entrance cable, was consistent with

Appalachian's tariff filed with the Commission and previously approved by the Commission. The Commission's suggestion that the hearing of March 7, 1975, provided Appalachian with notice and opportunity to be heard sufficient to satisfy the procedural due process requirements of the Fourteenth Amendment of the United States Constitution would, if accepted by this Court, reduce such requirements to a sham.

In this Brief, Appalachian will first consider several factual matters raised by Appellee which are not germane to this proceeding. We will then review the arguments raised by Appellee in support of its Motion to Dismiss or Affirm.

Preliminary Matters

The Commission emphasizes that Appalachian's change in its service entrance cable policy as of October 1, 1974 did not result in Appalachian's initiating the practice of *charging* for these service connections. The Commission argues that its order of March 6, 1975 could not apply to any service entrance cable charges imposed beginning October 1, 1974, because Appalachian made no such charges. Appellee then states at p. 7 of its Motion to Dismiss or Affirm that it is unclear "exactly what Appalachian is complaining of in this proceeding."*

This is pure camouflage. The Commission knows full well what Appalachian is complaining about. Appalachian absorbed the cost of installing these service entrance cables prior to October 1, 1974. Subsequent to October 1, 1974 Appalachian, in accordance with an option clearly set forth in its tariff on file with and approved by the Commission,

* Appellee ignores the ordering paragraph in its Order dated March 6, 1975: "It is further Ordered that Appalachian Power Company shall forthwith refund any of such charges already paid by its customers for such unapproved practices since October 1, 1974." The Order by its own terms does not limit such refunds to charges paid to Appalachian.

chose not to absorb such cost. Thus, after October 1, 1974, the customers who wanted the service connection were required to install the entrance cable at their own expense. The Commission's cease and desist order of March 6, 1975 directed Appalachian to absorb this cost once again. That order, therefore, directly and adversely affected Appalachian and that order was issued without notice to Appalachian or opportunity to be heard. This is what Appalachian is complaining about.

Appellee raises another irrelevancy by constantly referring to a different service practice change which occurred on February 10, 1975. Appellant has never objected to the procedure followed by the Commission in its consideration of the February 10, 1975 service practice change. If Appellee had followed a similar procedure with respect to the October 1, 1974 service practice change this appeal probably would have been unnecessary. In fact, the hearing of March 7, 1975 was in part scheduled for the very purpose of hearing testimony on the February 10, 1975 change. While Appalachian came prepared to present evidence on that matter, it certainly did not anticipate that the Commission would be awaiting its arrival with an order (predating the hearing) concerning the October 1, 1974 service practice change.

Appellant makes no response to the statement that the order relating to the February 10, 1975 change is moot other than that the issue was never raised. We turn now to the substantive arguments raised by Appellee in its Motion to Dismiss or Affirm.

ARGUMENT

I.

The Decision of the Supreme Court of Appeals of West Virginia Does Not Rest On Adequate Non-federal Grounds.

The Commission argues that the decision of the Supreme Court of Appeals of West Virginia rests on adequate non-federal grounds (Motion to Dismiss or Affirm, pp. 12-14). In support of this contention, the Commission cites several statutory provisions which give the Commission general control over the facilities, charges and services of public service corporations.

It is fundamental that the Opinion of the Supreme Court of Appeals of West Virginia contains no articulated rationale—state or federal—for its decision.* Moreover, nowhere in the language of the statutory provisions cited by the Commission in its Motion of Dismiss or Affirm may one find anything which may be said clearly to cover the situation at issue. Where the Supreme Court is unable to discover an adequate non-federal ground in support of the state court judgment "it will be presumed that the State court based its judgment on the law raising the Federal question, and this court will then take jurisdiction." *Klinger* v. *Missouri*, 80 U.S. 257, 263 (1871).**

*See Jurisdictional Statement, App., p. 3a.

**At best in this case there is an ambiguity as to the likely grounds of the state court's decision. In such cases, the Court has remanded the matter for further consideration and clarification. *Kovacs* v. *Brewer*, 356 U.S. 604 (1958); *Minnesota* v. *National Tea Co.*, 309 U.S. 551 (1940). In the alternative, the Court may continue the case for such time as will enable counsel to apply to the state court for amplification, amendment or certificate, so that the basis for its judgment may be made plain. *Department of Mental Hygiene* v. *Kirchner*, 380 U.S. 194 (1965); *Lynum* v. *Illinois*, 368 U.S. 908 (1961), 372 U.S. 528 (1963); *Hammerstein* v. *Superior Court*, 340 U.S. 622 (1951), 341 U.S. 491 (1951); *Herb* v. *Pitcairn*, 324 U.S. 117 (1945).

Even assuming that the cited state grounds may arguably support the state court's decision, whether those grounds can stand independently is a separate question. In view of the fact that the state court sustained the Commission's action and the federal due process issue was clearly raised, that court, by definition, had to decide that issue against Appalachian. The Supreme Court must, therefore, decide whether the federal constitutional issue is substantial enough so that no non-federal ground could stand alone as the basis for the state court's decision. This is precisely the question to which Appalachian's Jurisdictional Statement is directed. Thus the Commission's argument that the state court's decision was based upon adequate non-federal grounds reduces itself to the basic issue of the substantiality of the federal question.

In *Davis* v. *Wechsler*, 263 U.S. 22 (1923) the Court said:

> "Whatever springes the State may set for those who are endeavoring to assert rights that the State confers, the assertion of federal rights, where plainly and reasonably made, is not to be defeated under the name of local practice . . . [I]t is necessary to see that local practice shall not be allowed to put unreasonable obstacles in the way." 263 U.S. 22, at 24-25.

Were the Commission's argument on this point sustained, it could defeat almost any Supreme Court review of a Commission order merely by citing these broad regulatory

statutes which conceivably could sustain, by inference, almost any action of the Commission. This is especially dangerous in a case where the state court's opinion is completely silent as to the grounds for its decision. The Court long ago expressed its concern about defeating its review merely by raising a non-federal ground, however erroneous, and then suggesting that the state court may have based its decision thereon. *Nielson* v. *Lagow,* 53 U.S. 98, 110 (1851).

Appalachian submits that, under no circumstances, should the non-federal grounds cited be considered adequate to support the Supreme Court of Appeals' decision that the procedure followed by the Commission was lawful.

II.

The Order of March 6, 1975 Was Handed Down Without Providing Appalachian Notice Or Opportunity To Be Heard.

Appellee takes the position that Appalachian was afforded notice and a full evidentiary hearing on the matter in question (Motion to Dismiss or Affirm, pp. 10-11).

Appellee understandably does not stress the fact that the Commission's order was dated one day before the "full evidentiary" hearing was held. Nor does Appellee point out that Mr. Vaughan, Appalachian's witness at the "hearing", came prepared to testify on an entirely different matter as he explained at Tr. 28-30. The reason Mr. Vaughan came prepared to testify on a different matter was that he had no idea the Commission would consider the October 1, 1974 service practice change, because Appalachian was never so notified.

The Commission takes the position that because Mr. Vaughan was questioned before the order was handed

down, Appalachian cannot complain that it had no notice. Chairman Smith of the Commission asked Mr. Vaughan whether the letter he sent the Commission contained the basis upon which Appalachian relied when it changed its service practice. That letter made reference only to the change which was to be implemented on February 10, 1975 and not the change which already had been implemented as of October 1, 1974. When Mr. Vaughan answered "yes" the pre-dated order, which dealt with both the October 1, 1974 change and the February 10, 1975 change, was then handed down. In following this procedure, the Commission must have established an unenviable record of reducing notice and opportunity to be heard in a manner now claimed sufficient to satisfy due process into two pages of transcript dealing with a matter unrelated to the subject of this appeal.

III.

Appellee's Contention That Appalachian Failed To Exhaust Its Administrative Remedies Is Inapposite.

The Commission argues that because Appalachian did not provide the Commission with notice of its October 1, 1974 change in its service entrance cable policy, "Appalachian cannot complain that it did not have notice of Commission cognizance of the change" (Motion to Dismiss or Affirm, p. 10). Appalachian was not required to notify the Commission of such change. Appalachian's tariff, which was filed with and approved by the Commission, plainly afforded Appalachian the option of whether or not to absorb the service entrance cable costs. Upon approving this tariff, the Commission was clearly allowing Appalachian the privilege of changing its policy when it desired. Ever since it approved that tariff, the Commission was on notice that Appalachian might change its policy in accord-

ance with the precise language of the tariff. Because Appalachian was not required to notify the Commission of its change by definition, it was not required to apply to the Commission for authority to do so.* On this basis, the Commission's pallid contention that Appalachian has failed to exhaust its administrative remedies must be rejected out of hand.

* Appellee cites the West Virginia Code, Chapter 24, Article 3, Section 1 in support of its argument. That section provides that no public utility shall discontinue any *facility* without first obtaining authority from the Commission and is inapplicable on its face to the case at bar because Appalachian did not discontinue any facilities but merely changed its service practice of charging for certain facilities. Nor is the case of *Norfolk & Western Ry. Co.* v. *Public Service Commission* 91 W. Va. 414 (1922) apposite here. In that case the court made it clear that the Commission's order eliminating a grade crossing was preceded by notice, opportunity to be heard and findings of fact.

Conclusion

Appalachian reiterates that the gravity of the claim in this case is apparent. It involves traditional concepts of constitutional law and the necessary safeguards for fair and open administrative procedures. The matter is of great public importance and requires plenary consideration by the Court.

Respectfully submitted,

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